



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue
Seattle, WA 98101

NOV 27 2002

Reply To
Attn Of: OAQ-107

R. Steven Brown, Executive Director
The Environmental Council of the States
444 N Capitol St., NW, Suite 445
Washington, DC 20001

Re: ADEC v. EPA, Federal oversight of State issued PSD permits

Dear Mr. Brown:

The purpose of this letter is to provide the U.S. Environmental Protection Agency's (EPA's) perspective on several of the issues discussed in the November 5, 2002, letter from Michele Brown, Commissioner, Alaska Department of Environmental Conservation (ADEC) and Dennis Hemmer, Director, Wyoming Department of Environmental Conservation to ECOS members and to ask you to distribute this letter to your membership. The November 5th letter relates to EPA's authorities in implementation of the Clean Air Act (CAA) and to specific exercise of those authorities in a permitting decision made by ADEC. I have enclosed a copy of the decision from the Court of Appeals for the Ninth Circuit, which is referenced in the November 5th letter.

While I certainly respect and recognize the importance of state sovereignty, I also believe that federal oversight plays an important role in assuring the integrity of the new source review program. It is my view, and the one upheld by the Ninth Circuit, that the CAA specifically contemplates that EPA will exercise its oversight responsibility in individual PSD permit actions when permitting authorities act outside the bounds of their approved program discretion. Section 113(a)(5) of the CAA states, in part:

Whenever....the Administrator finds a state is not acting in compliance with any requirement or prohibition of the chapter relating to construction of new sources or modification of existing sources, the administrator may issue an order prohibiting the construction or modification of any . . . source

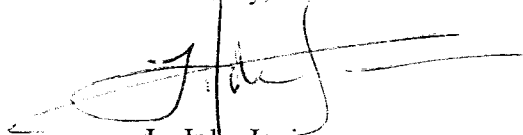
This case involves ADEC's determination of the best available control technology (BACT) for one large diesel-fired engine, referred to as MG-17, in a PSD permit for the Teck-Cominco Red Dog mine in Alaska. EPA believes that the record for the ADEC's permit does not support the selection of low-NO_x technology as BACT; the Ninth Circuit specifically upheld this finding. Contrary to the State's assertions, EPA has not "mandated" the use of the selective catalytic reduction (SCR) technology, or tried to substitute its BACT determination for the State's determination. Instead, EPA reviewed the State's justification and rationale for its BACT

determination and determined that ADEC's record did not support the draft permit. On that basis, EPA issued an Order to the State of Alaska prohibiting issuance of the final permit as it relates to the engine MG-17 until it either (1) selects the control technology supported by the existing record, or (2) adds a reasoned justification for the selection of the less effective low-NO_x control technology.

When the State issued the final PSD permit after receiving the EPA order prohibiting it, EPA issued an Administrative Order to the company prohibiting construction of only the new engine but allowing all other construction which was permitted in the same action to proceed. As described in the November 5th letter, the State of Alaska and the company sought judicial review of EPA's authority to challenge the state's permit. On July 30, 2002, the Court of Appeals for the Ninth Circuit decided (3-0) that EPA has the ultimate authority to decide whether a state has complied with the BACT requirements of the Clean Air Act and the State Implementation Plan. After full consideration of the state's explanation of the basis for its permit decision, the Ninth Circuit decision confirmed that there was not a reasoned basis for the state's BACT determination. On October 30, Alaska filed a petition for certiorari with the United States Supreme Court seeking review of the Ninth Circuit's opinion. The United States' response will be filed shortly. Additional information on the issues raised by the State of Alaska in previous statements related to environmental impact, technical feasibility and cost can be found in the enclosure. I hope that this information will allow your members to more fully understand the situation.

In closing, I would point out that in spite of the litigation, EPA continues to have a constructive working relationship with the State of Alaska. For example, at the State's request, EPA is conducting a comprehensive review of its construction permit program and has worked closely with ADEC in identifying and resolving numerous violations at the Red Dog mine which were discovered during a joint EPA-ADEC compliance inspection during the summer of 2000. Questions about the information provided in this letter and the enclosure may be directed to the following EPA Region 10 staff: Betty Wiese, project manager, (206/553-0695), John Keenan, technical lead (206/553-1817), or Julie Matthews, staff attorney (206/553-1169).

Sincerely,

A handwritten signature in black ink, appearing to read "L. John Iani", with a long horizontal flourish extending to the right.

L. John Iani
Regional Administrator

Enclosures

cc: Michele Brown, Alaska DEC
Dennis Hemmer, Wyoming DEC
Regional Air Division Directors, Regions 1-9